

Freedom of Information Act 2000

Decision Notice

Date: 10 March 2010

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London
SW1H 9DA

Summary

The complainant made a request for information relating to the awarding of a major IT contract, including a copy of the agreement between the public authority and the winning bidder. The public authority withheld some of the information, citing section 43, and was slow to carry out an internal review of the decision, which it eventually upheld. The Commissioner found that the public authority had failed to demonstrate that the exemption at section 43 was engaged by the withheld information, and he therefore required it to be disclosed. He also found breaches of section 1(1)(b), section 10(1) and section 17(1)(b) in the way the request was handled.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant originally submitted his request to the Cabinet Office, which, at the time, had responsibility for the body of work to which the request related.
3. Under a Machinery of Government change, responsibility for the work subsequently transferred to the Department for Work and Pensions ("DWP"). The request, appeal and all related correspondence was transferred to the DWP accordingly. All of the Commissioner's correspondence on the matter has been with the DWP.

The Request

4. On 27 December 2007 the complainant submitted the following request for information to the Cabinet Office.

“1. The full text of any and all contracts or agreements between the Cabinet Office and Atos Origin regarding the provision of the Government Gateway service;

2. The full text of any and all risk assessments carried out by the Cabinet Office regarding the provision of the Government Gateway service by the private sector;

3. A list of any and all bidders competing for the Government Gateway provision contract, and the price offered by each bidder;

4. A description of how Atos Origin was chosen as contractor for this service;

5. Any and all costs, broken down by year and type of cost, incurred by the Cabinet Office in relation to the provision of the Government Gateway service:

- (a) before provision of the service was handed over to Atos Origin;*
(b) after provision of the service was handed over to Atos Origin.”

5. The Cabinet Office received the request on 31 December 2007. On 29 January 2008 it wrote to the complainant, confirming that it held information covered by his request and extending the time limit for response in order to consider public interest arguments. The Commissioner has not been supplied with a copy of this letter (although it is referred to in subsequent correspondence between the complainant and the Cabinet Office) and has therefore not been able to ascertain whether it complied with the requirements at 17(1).

6. The Cabinet Office issued a refusal notice in respect of the request on 12 February 2008. It stated that the information covered by points 1, 2 and 5 of the request was exempt under section 43 of the Act, stating:

“Section 43 is a qualified exemption whereby information is exempt if its disclosure would, or would be likely to, prejudice the commercial interest.”

7. It made a partial disclosure in respect of point 3 of the request, providing the names of the bidders but withholding price information, citing section 43.
8. Referring to its consideration of the public interest in reaching its decision, it stated:

“For the information withheld under section 43 factors in favour of disclosing the information include the general public interest in openness in government and that there is transparency in the accountability of public funds. Factors in favour of maintaining the exemption include the fact that disclosure could make it less likely that companies, or individuals would provide the department with commercially sensitive information in the future and consequently undermine the ability of the department/agency to fulfil its role. Disclosure could also prejudice the commercial interests of the department by affecting adversely its bargaining position during contractual negotiations which would result in the less effective use of public money.

Having considered all the circumstances of the case we are of the view that the public interest in maintaining the exemption outweighs the public interest in releasing the information.”

9. In response to point 4 of the request, it stated that the selection of Atos to provide services had followed the standard OJEU procurement process negotiation procedure. It outlined the standard process followed and referred the complainant to a European Journal reference number (ID:2005-048287) for more information.
10. On 12 February 2008 the complainant wrote to the Cabinet Office and asked for the decision to be reviewed. He briefly set out five arguments which he felt should have been taken into account when considering whether the public interest favoured disclosure over maintenance of the exemption.
11. On 7 July 2008 the Cabinet Office emailed the complainant to explain that as part of a recent Machinery of Government change, the information he sought access to had been transferred to the Department for Work and Pensions (DWP), and that his request for a review of the decision to withhold information had been transferred accordingly. It provided a contact point for his request at the DWP, and assured him that the DWP was addressing the matter.
12. On 11 September 2008 the complainant wrote to the DWP to ask for a response to his request for an internal review (the Commissioner does not have a copy of this letter, but it is referred to in the DWP's email to the Commissioner of 14 December 2009).
13. On 17 October 2008 the DWP wrote to the complainant, with what purported to be its response to his request for an internal review. It made no reference to having revisited the original request or its initial response and offered no further examination of the exemption at section 43, its reasons for applying it or the balancing test in respect of the public interest. The letter merely rebutted each of the points the complainant made in his letter of 12 February 2008 and advised him that he had now exhausted its internal

review procedures. It directed him to complain to the Information Commissioner if he was not happy with the outcome.

The Investigation

Scope of the case

14. On 8 December 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points.
 - Whether the DWP was correct to withhold the contract document in its entirety under section 43. He referred to the age of the contract at the time he made his request and the fact that it was in the “fast moving IT field”. He made particular reference to what he considered to be a similar decision reached by the Commissioner in a Decision Notice referenced FS50083381, and considered by the Information Tribunal in the case EA/2008/0018.
 - Whether the Cabinet Office’s refusal notice breached section 17(1)(c), in that it failed to provide a reason why section 43 applied to each specific piece of information.
 - Whether the Cabinet Office’s response to point 4 of his request (information about the procurement of the winning bidder) breached section 1(1)(b), as it provided a reference to information about a completely different contract.
 - Whether the refusal notice breached section 17(1)(b), in that it did not specify the appropriate sub-section of section 43 that was being relied upon.
 - Whether the internal review had been handled in compliance with paragraph 39 of the Code of Practice issued under section 45 of the Act (specifically, that any complaints procedure provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, and that such a review be conducted promptly).
15. The Commissioner also considered whether the DWP had acted correctly by addressing the application of section 43 against the third point of the request (price offered by bidders).
16. Subsequent to the Commissioner’s involvement, the DWP also indicated that it wished to redact under section 40 the names of four key Atos personnel. The complainant has confirmed that he does not wish to challenge this redaction, and so the DWP’s application of section 40 is not considered in this Decision Notice.

Chronology

17. The Commissioner wrote to the DWP on 19 October 2009, setting out the history of the complainant’s concerns. He asked to be supplied with a copy of all of the

information held by the DWP that was covered by the request. He also asked that the DWP address the question of whether the OJEU reference number, given in response to the fourth part of the request, was correct. He also addressed a number of other points.

Section 43

18. The Commissioner asked the DWP to provide detailed explanations as to whose commercial interests would or would be likely to be prejudiced by the disclosure of information in response to the request, how and why, relating its arguments back to particular items of information as necessary. If a third party's interests were likely to be compromised, he advised that the DWP may wish to consult it accordingly.

Public interest test

19. The Commissioner asked the DWP to set out its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information, with reference to the arguments it considered. He also asked it to clarify what consideration it had given to the effect of the length of time that had elapsed since the information had been requested.

Redaction

20. The Commissioner asked the DWP to set out what consideration it had given to the release of information in a redacted form.

Delays

21. The Commissioner asked the DWP to account for the delay in handling the complainant's request for an internal review.
22. On 24 November 2009 the DWP emailed the Commissioner to explain that it had consulted with what it referred to as "the information owners" (the Commissioner assumes this to be Atos, the successful bidder) and that it had agreed that much of the agreement could now be released. It explained that some information would still be withheld under the exemption at section 43(2) and promised to let the Commissioner have its full response once it had been signed off by a senior civil servant.
23. The DWP wrote again on 1 December 2009. Rather than following the format of the Commissioner's letter, its letter instead addressed the complainant's original request, point by point.
24. **Point 1- the agreement:** the DWP enclosed a copy of the agreement. It explained that it had considered the effect of the passage of time in reducing the sensitivity of the agreement, and had concluded that much of it could now be released to the complainant. It continued:

“However, it remains our contention that certain elements of the Agreement remain sensitive and should not be disclosed. I have attached a schedule which sets out which parts are considered releasable and those which should be withheld. You will see that, apart from the single use of the exemption at section 40 FoIA, all the material deemed to be not suitable for release are exempted under s43(2).

Arguments in favour of withholding commercially sensitive information are attached at Annex A. DWP maintain that the information withheld meets those criteria. There are also more specific information related commercial interest arguments in the table.”

25. The DWP enclosed a “redactions matrix” which identified proposed redactions under section 43(2). This matrix is included as Annex A of this Notice. It also supplied an annex which it described as containing arguments in favour of withholding commercially sensitive information (these were, effectively, public interest arguments). These items did not address the questions outlined in paragraphs 17 and 18, above.
26. Having reviewed the agreement, the Commissioner noted that schedule 15 and its annexes, referred to in the redactions matrix, had not been supplied by the DWP. Similarly the information listed under the section titled Change Control Notes had been omitted.
27. **Point 2 - risk assessments:** the DWP acknowledged that it had informed the complainant that this information was exempt under section 43. On reflection it felt that it had misunderstood the request, and that the complainant was seeking a comparative analysis of the risks of public sector service provision versus private sector provision. The DWP argued that since the service had always been provided by the private sector, no such comparative assessment had ever been conducted and so the correct response to the second point of the request should have been that the information was not held.
28. **Point 3 - bidders and price offered:** the DWP maintained that this point had “already been responded to”, with bidders’ identities having been revealed and reasons for withholding the prices offered having been given. It offered none of the information requested in paragraphs 17 -19, above.
29. **Point 4 - procurement information:** the DWP maintained that the correct document reference had been supplied to the complainant, and suggested that he had merely had difficulty locating it on the appropriate website. It said that a hard copy would therefore be sent to him. It also enclosed a copy of the press release covering the appointment, which it said was in the public domain.
30. **Point 5 – costs:** the DWP maintained that it did not collect audited financial information in the level of detail specified in the request. It enclosed a copy of its financial management information to support effective project management and offered to send this to the complainant.

31. In closing, the DWP said that it would now send the outstanding information to the complainant, copying the correspondence to the Commissioner.
32. On 14 December 2009 the DWP wrote to the Commissioner to account for the delay in carrying out a review of the way the request was handled. It apologised and explained that the review papers had been overlooked when the work was transferred in from the Cabinet Office, due to being incorrectly merged with a separate case.
33. On 26 January 2010 the DWP emailed the Commissioner to advise that it had sent the redacted version of the 'Managed Service Provider' agreement together with information relating to risk assessments and contract costs, to the complainant on 22 January 2010. It suggested that if the complainant was content with the response he should consider withdrawing his complaint to the Commissioner.
34. The DWP's letter to the complainant stated that the agreement had been:

"...redacted in only those areas deemed to be potentially damaging to the Department's or the Contractor's commercial interests... in line with Section 43(2)..."
35. It set out some very broadly drawn public interest arguments in favour of disclosing the information before stating that it had concluded that disclosure would be likely to prejudice the commercial interests of the department by adversely affecting its bargaining position during contractual negotiations, which would result in the less effective use of public money.
36. The complainant emailed the Commissioner on the same day, confirming receipt of the information sent by the DWP and expressing dissatisfaction with its decision to redact information under the exemption at section 43. He asked the Commissioner to issue a Decision Notice.
37. He subsequently clarified, in an email dated 2 February 2010, that he considered that the information at points 2, 4 and 5 had now been supplied to his satisfaction, but that he still challenged the decision to redact sections of the agreement and the prices offered by bidders.
38. The Commissioner wrote to the DWP on 26 January 2010. He advised the DWP that he did not agree with its revised reading of the second point of the request, and considered the original reading to be correct. He noted that the DWP had not provided him with all the information covered by the request (schedule 15 and all its annexes, the items listed under Change Control Notes and the risk assessment information). He concluded that he did not consider that it had submitted sufficiently persuasive arguments in support of its claim that section 43(2) applied in respect of information redacted from the contract agreement and prices submitted by bidders.
39. In view of these points, the Commissioner stated that he was proceeding to the Decision Notice stage.

40. The DWP subsequently provided the Commissioner with schedule 15 and its annexes, on 2 February 2010. The other information remains outstanding.

Analysis

Exemptions

Section 43 – Commercial Interests

41. Section 43(2) of the Act provides that information will be exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority).

42. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is “real, actual or of substance” and show some link between the potential disclosure and the prejudice. Further, a public authority also needs to demonstrate that the prejudice would occur if the information was disclosed.

43. The DWP has stated to the Commissioner in this case, that disclosure of the information ‘would’ cause prejudice to someone’s commercial interests. The Commissioner notes the Tribunal’s comments in *Hogan v Oxford City Council and the Information Commissioner* (EA/2005/0030) that the ‘would prejudice’ limb of the test:

“...places a much stronger evidential burden on the public authority to discharge.”

44. The Commissioner’s view, taking into account the Tribunal’s comments in *Hogan*, is that there is an evidential burden on public authorities to be able to demonstrate that:

- the nature of the prejudice claimed can be linked back to the disclosure of the information in question;
- the likelihood of prejudice occurring meets the test for the level of likelihood claimed.

45. This approach was demonstrated in *Reith v Information Commissioner and London Borough of Hammersmith and Fulham (LBHF)* (EA/2006/0058), where the Tribunal found that the public authority had not provided evidence of a causal link, and as a result the exemption (in this case section 31(1)(g) in conjunction with section 31(2)(c)) was not engaged. LBHF relied upon its own belief that prejudice would occur, but had not provided evidence beyond this. The Tribunal considered that “[i]ts evidence is not independent, and being unsupported amounts to bare assertion. Such examples as given by LBHF do not demonstrate

anything other than an unsupported fear that disclosure might increase illegal parking.”

46. The DWP put forward relatively little to support its application of the exemption at section 43(2) to the agreement and the bidding information. To summarise, it stated that to disclose the requested information about the tendering process in its entirety would:

- undermine the process of competitive tendering where it has an obligation to obtain best value for money;
- inhibit companies or individuals from providing it with commercially sensitive information, consequently undermining *“the ability of the department/agency to fulfil its role”*;
- give Atos’ competitors a commercial advantage or allow them to maliciously interfere with Atos’ fulfilment of the contract.

47. The DWP also sought to invoke section 43(2) in respect of information which identifies the location of service provision, on security grounds, arguing that disclosure could leave it vulnerable to malicious interference. The Commissioner does not consider that this argument can be accepted as inherent to the exemption at section 43(2).

48. The DWP has not provided further details of the prejudice envisaged nor explained how or why the disclosures would result in it, despite being asked by the Commissioner to do this. In many instances (particularly in the redactions matrix) it merely describes the information covered by the exemption (for example, that the requested information reveals figures, calculations and benchmarking information) and asserts that the exemption applies. It does not elaborate on the nature or likelihood of the prejudice. In one case the DWP has not indicated the extent of proposed redactions; the redactions matrix states that schedule 2 of the agreement is subject to a “partial exemption” under section 43(2), without delineating exactly what portion of the information contained in schedule 2 is subject to the exemption.

49. In some instances, as noted in paragraphs 26 and 38, above, the information referred to has simply not been provided for the Commissioner’s scrutiny.

50. In the case of the price offered by competing bidders (point 3) it has offered no further information, merely referring the Commissioner to its refusal notice, stating: *“This question has already been responded to, with part of the information in question being released to [the complainant] and reasons for prices not being provided have already been given.”*

51. The Commissioner has had regard to the refusal notice, the relevant section of which is reproduced at paragraph 8, above.

52. The Commissioner has therefore considered the withheld information in conjunction with the representations provided by the DWP. It is the

Commissioner's view that the DWP has not explained in enough detail the prejudice claimed or how the disclosure of the withheld information would lead to that prejudice.

53. As the DWP has not provided the required level of detail, or provided evidence to support its statement that disclosure would cause prejudice, the Commissioner is unable to conclude, following the Tribunal's reasoning in the *LBHF* case, that the exemption is engaged. He therefore requires the information to be disclosed.

Procedural Requirements

Section 1 – duty to make information available

54. The complainant asked the Commissioner to consider whether there had been a breach of section 1(1)(b) in response to point 4 of his request (information about the procurement of the winning bidder) as he believed he had been provided with information relating to the procurement process for a completely different contract.
55. Section 1(1)(b) of the Act creates the right for any person making a request for information to a public authority to have that information communicated to him, if it is held by the public authority.
56. The DWP has never asserted, either to the complainant or the Commissioner, that it does not hold information covered by the fourth point of the request and it was able to provide the Commissioner with a copy of the document. The Commissioner has therefore concluded that the information was held by it, for the purposes of the Act.
57. The Commissioner then went on to consider whether the information had been “communicated” to the complainant. In responding to this part of the request, the DWP had explained that the selection procedure followed the standard OJEU procurement process using negotiation procedure. It referred the complainant to an OJEU reference number (ID:2005-048287) for more information. It did not provide a web address or any other information about how the document could be accessed.
58. In his complaint to the Commissioner, the complainant cited a web address (<http://ted.europa.eu/udl?uri=TED:NOTICE:48287-2005:TEXT:EN:HTML>) which bore a document carrying the reference 48287-2005. The document was a French contract relating to structural engineering consultancy services and did not match the document that had been supplied to the Commissioner by the DWP.
59. Furthermore, the Commissioner was unable to locate the document by inputting the search term “OJUE 2005-048287” into Google.
60. The Commissioner concluded that merely stating that the procurement had followed established procedures and providing a reference number for a pertinent document, without providing information on how to access it, could not be

considered as constituting “communicating” held information to the complainant. He considers that there was therefore a breach of section 1(1)(b). (He notes that the document was subsequently provided to the complainant.)

61. Subsequent to the Commissioner’s intervention, the DWP conceded that section 43(2) did not apply in respect of some of the information it held, and released it to the complainant. Therefore, in failing to provide the information by the completion of the internal review or the time for statutory compliance there was a further breach of section 1(1)(b) of the Act.

Section 10 – time for compliance

62. By failing to provide the information within twenty working days, there was a breach of section 10(1) of the Act.

Section 17 – refusal notice

63. The refusal notice issued by the DWP stated that information was being withheld in reliance on the exemption at section 43. It failed to specify the subsection of the exemption which was applicable (section 43(2)), which is a breach of section 17(1)(b) of the Act.

64. The DWP subsequently indicated to the Commissioner, in its letter of 1 December 2009, that it considered that some information should also be withheld under section 40. It failed to specify the appropriate sub-section; however, the Commissioner has inferred it to be section 40(2). To fail to specify in a refusal notice an exemption which is later relied upon is also a breach of section 17(1)(b).

65. The complainant asked the Commissioner to consider whether there had been a breach of 17(1)(c), since he argued that the refusal notice failed to provide a reason why section 43 applied to each item of withheld information.

66. Section 17(1)(c) requires that a refusal notice should state (if it is not otherwise apparent) why a particular exemption applies. The refusal notice issued by the DWP failed to specify that it was relying upon section 43(2), however the notice did state that:

“Section 43 is a qualified exemption whereby information is exempt if its disclosure would, or would be likely to, prejudice the commercial interest.”

67. The notice went on to list the public interest arguments the DWP had considered in reaching the decision to withhold the information (reproduced at paragraph 8, above). The Commissioner considers that although the relevant sub-section was not specified and the application of the exemption was not explicitly explained, it was possible to deduce from the information which was supplied broadly why the exemption had been applied. He has concluded that it met the criteria of being “otherwise apparent”. The Commissioner therefore does not consider that there was a breach of section 17(1)(c) in this respect.

The Decision

68. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it issued a refusal notice that was compliant with the requirement at section 17(1)(c).

69. However, the Commissioner has also decided that that the public authority did not deal with the following element of the request in accordance with the requirements of the Act:

- it incorrectly applied the exemption at section 43(2) to the withheld information.

70. The Commissioner has also identified breaches of sections 1(1)(b), 10(1) and 17(1)(b).

Steps Required

71. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant the information identified as withheld in the redaction matrix (with the exception of that marked as withheld under section 40(2)), and the prices supplied by competing bidders.

72. The public authority must take the steps required by this Notice within 35 calendar days of the date of this notice.

Failure to comply

73. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

74. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

75. The complainant queried whether the internal review had been handled in compliance with paragraph 39 of the Code of Practice issued under section 45 of the Act (specifically, that any complaints procedure provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, and that such a review be conducted promptly).
76. Paragraph 39 of the section 45 Code of Practice (the "Code") encourages authorities to '*...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.*'
77. Paragraph 39 of the Code recommends that review procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
78. The Commissioner is concerned that, in this case, the public authority's review significantly exceeded the recommended timescales, despite the publication of his guidance on the matter. The additional time taken in this case would also appear to have been unwarranted as the outcome of the review in this case, as communicated to the complainant, was very limited and did not demonstrate that a full reconsideration of the factors had taken place.
79. The Commissioner, therefore, advises that the public authority ensures that future internal reviews are carried out in accordance with the guidelines in the Code and with the recommendations contained in his guidance.

Right of Appeal

80. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 10th day of March 2010

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Commercial interests.

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”